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13 **UNITED STATES DISTRICT COURT**
14 **EASTERN DISTRICT OF WASHINGTON**

15 ELF-MAN, LLC,

16 Plaintiff,

17 vs.

18 RYAN LAMBERSON,

19 Defendants.

20 No. 2:13-CV-00395-TOR

21 DEFENDANT'S REPLY
22 MEMORANDUM IN SUPPORT OF
23 HIS MOTION TO COMPEL

24 DEFENDANT'S REPLY MEMORANDUM IN
25 SUPPORT OF HIS MOTION TO COMPEL - 1

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1 Ryan Lamberson submits this Reply Memorandum in support of his Motion
 2 to Compel Discovery, ECF No. 57. This Reply Memorandum is supported by the
 3 Declaration of J. Christopher Lynch.

4 Plaintiff filed an Opposition, ECF No. 62, to Mr. Lamberson's Motion to
 5 Compel, but the Opposition was not filed on time under this Court's Local Rule
 6 7.1. Consequently, Mr. Lamberson filed a Motion to Strike the Opposition and its
 7 related Declarations. ECF No. 63. Since the Court has not yet ruled on that Motion
 8 to Strike, Mr. Lamberson submits this Reply Memorandum.

9 Plaintiff raises four points in its Opposition, ECF No. 62, but none of those
 10 points is sufficient to deny the Motion to Compel.

11 **1. The Motion to Compel is Not Moot.**

12 The Motion to Compel is not moot because plaintiff's Motion to Dismiss has
 13 not been granted, and the plaintiff can withdraw it if the conditions the Court
 14 imposes are unacceptable. *Lau v. Glendora Unified School District*, 792 F.2d 929
 15 (9th Cir. 1986). Mr. Lamberson will ask the Court to impose payment of costs and
 16 attorneys' fees as a condition of granting the dismissal as allowed by *Davis v.*
 17 *McLaughlin*, 326 F.2d 881, 883 (9th Cir. 1964). Mr. Lamberson is concerned that
 18 plaintiff's Motion to Dismiss is a delay tactic and that plaintiff might avail itself of
 19 the "out" provided under *Lau* after urging the Court not to decide Mr. Lamberson's
 20 earlier-pending motions. Defense counsel inquired of Mr. Lowe on this point and
 21 he indicated he had no authority to pay any monies to settle the case, so Mr.
 22 Lamberson is concerned that plaintiff has no real intention of paying reasonable

1 attorneys' fees as a condition of its settlement. Lynch Decl. at ¶ 2. If plaintiff
 2 rejects such a condition, then Mr. Lamberson's Motions to Compel are ripe. Mr.
 3 Lamberson does, however, acknowledge that if the court imposes conditions on the
 4 Motion to Dismiss that are acceptable to both parties then both of his Motions to
 5 Compel are indeed moot.

6 Mr. Lamberson has two pending Motions to Compel: (i) a Motion to
 7 Compel plaintiff's German investigators to appear for deposition in Spokane at
 8 plaintiff's expense, ECF No. 42, and (ii) a Motion to Compel plaintiff to provide
 9 documents responsive to defendant's Second Set of Requests for Production
 10 regarding APMC, the Germany-based company that apparently is the plaintiff's
 11 "representative" with whom plaintiff's former counsel apparently is having her
 12 ethical dilemma, ECF No. 57.

13 Each of these motions goes to the heart of the case against Mr. Lamberson.
 14 The German investigators are the only "witnesses" against Mr. Lamberson and
 15 cannot be lawfully deposed in Germany without tremendous hardship to the
 16 parties. APMC is the Germany-based company that has apparently contracted with
 17 plaintiff's assignee Vision Films, Inc. to conduct anti-piracy services for Vision
 18 Films. APMC has a direct financial interest in the outcome of this matter, and it is
 19 a real party in interest. Plaintiff has never disclosed this interest to the Court as part
 20 of its required corporate disclosures under Fed. R. Civ. P. 7.1, but discovery shows
 21 it does have a direct financial interest. Lynch Decl. at ¶¶ 6-9.

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1 Recall that plaintiff initially refused to produce any documents under
 2 Request for Production No. 15 about its relationship with its investigators. At a
 3 conference on February 27, 2014, the Court required plaintiff to produce any
 4 relevant documents as well as a narrative to describe the relationship. ECF No. 31.
 5 Plaintiff did not produce this narrative within 14 days as required by LR 37.1(c).
 6 After repeated requests from Mr. Lamberson's counsel, Ms. VanderMay provided
 7 a narrative on April 14, 2014. On April 16, 2014, counsel for Mr. Lamberson wrote
 8 to plaintiff's counsel asking for a truthful explanation, because the April 14, 2014,
 9 explanation was obviously implausible. The explanation was obviously
 10 implausible because (among other reasons) it had Germany-based APMC hiring
 11 South Dakota shelf corporation Crystal Bay Corporation ("CBC") on a termless,
 12 paperless relationship, and that Crystal Bay Corporation somehow hired German
 13 national Mr. Macek as "plaintiff's primary investigator" on a monthly salary,
 14 despite the fact that CBC was a delinquent South Dakota company with no offices
 15 and no authority to hire foreign workers. Lynch Decl. at ¶¶ 7-11.

16 The explanation did include an April, 2012, agreement between APMC and
 17 Vision Films that Ms. VanderMay said was part of the explanation. That
 18 agreement is filed under seal and is designated as Exhibit B to Mr. Lynch's
 19 Declaration. Lynch Decl. at ¶ 8. Page 7 of that agreement includes redacted
 20 portions, but does otherwise indicate that any recoveries from APMC's
 21 enforcement campaign would be allocated first to APMC's costs, and then "the
 22 remaining monies shall be distributed as follows: (a) The appointed Attorney's and

1 litigation [REDACTED IN ORIGINAL], (b) The appointed forensic IT expert
 2 costs [REDACTED IN ORIGINAL], (c) The RIGHTS OWNER shall receive
 3 [REDACTED IN ORIGINAL].” In other words, it appears that APMC as the
 4 investigator and financier of the litigation has a direct and contingent stake in it.

5 After delivering the April 16, 2014, request for a truthful explanation,
 6 counsel for Mr. Lamberson discovered a public website with a “Prezi” presentation
 7 that explained the operations of APMC. We provided this link to the Court with the
 8 Motion to Compel:

9 http://prezi.com/b_f7djco81ri/copy-ofthemanako123/?utm_campaign=share&utm_medium=copy

10 We also now provide a transcript of this presentation from the website as
 11 Exhibit C to Mr. Lynch’s Declaration. The presentation was authored by Gerephil
 12 Molina and we have been unable to get Mr. Molina’s cooperation as a witness to
 13 authenticate the document. Lynch Decl. at ¶ 9. But the document is admissible as
 14 an admission of APMC, a real party in interest, plus it is submitted only for the
 15 purpose of explaining why the Second Set of Requests for Production was served.

16 The transcript makes clear that APMC’s job is to harvest BitTorrent data and
 17 sell it to rights holders along with litigation services. The transcript expressly
 18 mentions the role of Mr. Macek in dealing with preparation of Declarations to use
 19 with the lawyers hired by APMC to present to courts. There is no mention that Mr.
 20 Macek is somehow an employee of a South Dakota company. Lynch Decl. at ¶ 10.
 21 The transcript is astonishing. Here are excerpts:

1 “APMC stays in the background where they are invisible, but we are
 2 the center (i.e. ‘we make things happen.’)”

2 “We bring the clients to the law firms. We manage their legal
 3 strategy.”

3 “A real life settlement is around \$2500 - \$7500.”

4 “APMC’s goal: the more individuals that can be contained within the
 5 lawsuit, the more cost effective for the company.”

5 “Contracts that don’t need amending go straight to PA and Dan for
 6 signing.”

6 “The legal team will assist the lawyers/law firms with legal issues.
 7 They will create the legal documents (i.e. the motion of expedited
 8 discovery, demand and settlement agreement letter.)”

8 “APMC always goes for statutory damages because of the range
 9 (\$2,500 to \$150,000.)”

9 “What are the relevant things to note on completing the 2nd document,
 10 or the Declaration or Affidavit. This is basically a statement that
 11 declares what the plaintiff is saying under oath.”

11 “BPO Cebu [Philippines] will be receiving these declarations from
 12 Daniel Macek.”

12 “This declaration supports motion for expedited discovery, or telling
 13 the judge we need this information now.”

13 “Paragraph 2 in regards to software consultant (i.e. he can talk about
 14 software issues) & we’re hoping the judge won’t question his
 15 qualifications too much.”

15 Lynch Decl. at ¶ 11.

16 Given this astonishing revelation as to what the real relationship was of
 17 plaintiff Elf-Man, LLC to its investigators, and given the discrepancies between
 18 this exposé and the April 14, 2014, explanation given by Ms. VanderMay, counsel
 19 for Defendant prepared and served the Second Set of Request for Production
 20 asking for all communications between (i) APMC and Elf-Man, LLC, (ii) APMC
 21 and Vision Films, and (iii) APMC and counsel for Elf-Man, LLC. Lynch Decl. at
 22 ¶ 12. Counsel for Mr. Lamberson shared the Prezi presentation with Ms.

1 VanderMay in advance of the service of the Second Set of Requests for Production
 2 and asked her to explain if she had any privilege as to these inquiries. Lynch Decl.
 3 at ¶ 13. Ms. VanderMay's curt reply is quoted in the Motion to Compel. ECF No.
 4 57 at p. 6.

5 Given Plaintiff's initial reluctance even in light of a Court order to provide
 6 the explanation of the relationship of the investigators to Elf-Man, LLC, counsel
 7 for Mr. Lamberson did not expect any cooperation from Ms. VanderMay on this
 8 discovery, and that expectation proved to be true. No documents were produced.
 9 The "objections" that were produced were mailed six days after the due date. Any
 10 counsel who was sincerely interested in addressing the issues would have served
 11 these objections right away or at least on time. Untimely objections are waived in
 12 the federal system. *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468,
 13 1473 (9th Cir. 1992). Even objections that the information sought is privileged or
 14 work-product are waived if not timely served. *Davis v. Fendler*, 650 F.2d 1154,
 15 1161 (9th Cir. 1981).

16 The Motion to Compel explains the efforts Mr. Lamberson's counsel then
 17 made with Ms. VanderMay, Mr. Crowell and Mr. Lowe to get an explanation of
 18 the seemingly incorrect Certificate of Service (Lynch Decl. at ¶ 14, Ex. D), as well
 19 as the required privilege log and the documents themselves. The production would
 20 seemingly be simple, since the Prezi presentation explains that communications
 21 about each matter are done through the "Podio" web-service and include encoded
 22 filter names. But no documents were provided. No privilege log was provided.

1 Consequently, Mr. Lamberson filed his Motion to Compel discovery of the Second
 2 Set of Requests for Production.

3 Neither of Mr. Lamberson's earlier-pending Motions to Compel are moot
 4 unless and until the Court orders dismissal of the case.

5 **2. Mr. Lamberson has Certified his Efforts to Resolve the Dispute.**

6 Fed. R. Civ. P. 37(a)(1) requires a Certification "that the movant has in good
 7 faith conferred or attempted to confer with the person or party failing to make
 8 disclosure or discovery in an effort to obtain it without court action." Mr.
 9 Lamberson's Motion to Compel provides this Certification and Mr. Lynch's
 10 associated Declaration explains his correspondence with Ms. VanderMay, his 44
 11 minute telephone conversation and correspondence with Mr. Crowell, and his 66
 12 minute conversation with Mr. Lowe – all of which were primarily about APMC
 13 and plaintiff's continued efforts to hide the truth. Lynch Decl. at ¶ 15. When the
 14 Motion was filed, Mr. Lynch informed all three of these counsel that LR 37.1(b)
 15 requires a report 14 days before the noted hearing to explain the current state of the
 16 dispute. Mr. Lynch offered a 10:00 a.m. time for the call and offered to file the
 17 report. On the morning of the due date of the report, Mr. Lynch wrote Mr. Lowe
 18 offering to hold the call at 10:00 a.m. or 2:00 p.m., and Mr. Lynch provided an
 19 advance copy of defendant's position on the point. Mr. Lowe said he was too busy
 20 to talk, but he did submit his part of the statement, which Mr. Lynch compiled into
 21 the Joint Statement that was timely filed June 30, 2014. Lynch Decl. at ¶ 16. Mr.
 22
 23

1 Lamberson has fully complied with his Certification obligations of Fed. R. Civ. P.
 2 37(a)(1) and his reporting obligations of LR 37.1(b).

3 Plus, what is plaintiff trying to suggest by claiming there was no conference
 4 on the point – that it might have otherwise complied with its discovery obligations?
 5 Doubtful.

6 **3. Plaintiff has Waived its Objections.**

7 Ms. VanderMay's explanation of the May 22 Certificate of Service and the
 8 May 28 postmark is unpersuasive. Ms. VanderMay says she was in deposition on
 9 May 22, and that she forwarded the responses to Ms. Sweeten to finalize and serve.
 10 ECF No. 62-2, page 2. But Ms. Sweeten says that she "personally had Ms.
 11 VanderMay sign it" "on or about May 22." Didn't Ms. VanderMay recall signing
 12 the document, and when? Note that Ms. VanderMay does not say she actually
 13 signed the documents on May 22, and her narrative seems to indicate she was not
 14 in the Salem office on that day. The signatures on the responses and the Certificate
 15 of Service appear slightly different, like real signatures instead of an autopen
 16 signature or a copied signature. The Certificate of Service says it was served from
 17 Salem. Ms. Sweeten should be commended for her "on or about" candor, but this is
 18 not evidence of *service* on May 22. The most logical reading of these two
 19 declarations is that Ms. VanderMay did in fact sign them, but not on May 22.

20 **4. Plaintiff has not Demonstrated Privilege or Work-Product.**

21 Even if the objections are not waived, the entirety of communications
 22 between APMC and Elf-Man, LLC, Vision Films and the VanderMay and Crowell
 23

1 firms, is not and cannot be covered by some unexplained blanket privilege. Blanket
 2 assertions of privilege are “extremely disfavored.” *Clarke v. Am. Commerce*, 947
 3 F.2d 127, 129 (9th Cir. 1992). The burden is on the party asserting the privileged
 4 relationship to establish the elements of the relationship. *U.S. v. Munoz*, 233 F.3d
 5 1117, 1128 (9th Cir. 2000). (The burden for proving work product is also on the
 6 party raising the privilege. *Yurick v. Liberty Mutual*, 201 F.R.D. 465 (D. Ariz.
 7 2001)). This requires proving the elements of the privilege: that legal advice was
 8 sought from the attorney in that capacity in a confidential setting. *In re Fischel*,
 9 557 F.2d 209, 211 (9th Cir. 1977). No such explanation has been provided and no
 10 privilege log has been provided.

11 Mr. Lamberson is concerned that plaintiff’s counsel never communicated
 12 Mr. Lamberson’s numerous offers to settle the case and that Elf-Man, LLC was
 13 never advised that its potential exposure for defense attorneys’ fees was growing
 14 with each new dilatory tactic mandated by APMC. The requested discovery would
 15 show this, and the fact of these communications would not be privileged.

16 Finally, APMC is not a “functional employee” of Elf-Man, LLC entitled to
 17 invoke the privilege under *United States v. Graf*, 610 F.3d 1148 (9th Cir. 2010). If
 18 a true agent meets this threshold, the corporation can claim attorney-client
 19 privilege “as long as the communications are ‘made at the direction of corporate
 20 superiors in order to secure legal advice.’” *Graf*, 510 F.3d at 1158 (quoting *United
 21 States v. Chen*, 99 F.3d 1495, 1502 (9th Cir. 1996)).

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1 **5. Conclusion.**

2 The discovery sought by defendant is relevant and not privileged. Plaintiff
3 has waived any objections. Plaintiff's Opposition filed in violation of this Courts
4 Local Rules should be stricken.

5 Mr. Lamberson respectfully requests an Order compelling discovery, and
6 awarding attorneys' fees and a sanction of dismissal of plaintiff's case with
7 prejudice.

8

9 DATED this 3rd day of July, 2014.

10

11 LEE & HAYES, PLLC

12 By: s/ J. Christopher Lynch

13 J. Christopher Lynch, WSBA #17462

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24 *Counsel for Defendant Ryan Lamberson*

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of July, 2014, I caused to be electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

David A. Lowe lowe@lowegrahamjones.com

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DEFENDANT'S REPLY MEMORANDUM IN
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